

HOGAN & HARTSON
L.L.P.

Writer's Direct Dial
202/637-5706

April 7, 1999

COLUMBIA SQUARE
555 THIRTEENTH STREET, NW
WASHINGTON, DC 20004-1109
TEL (202) 637-5600
FAX (202) 637-5910

BY HAND DELIVERY

The Secretary
Federal Communications Commission
The Portals -- Room TW-325
445 12th Street, S.W.
Washington, DC 20554

DOCKET FILE COPY ORIGINAL RECEIVED
APR 07 1999
FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Re: Comments of Riverbank Restaurants, Inc. on
Partial Petition for Reconsideration in
MM Docket No. 97-234/GC Docket No. 92-52 and
GEN Docket No. 90-264

Dear Madam Secretary:


Please find enclosed an original and eleven copies of the above-referenced Comments (the "Comments"), which endorse the Petition for Reconsideration of Davis Television Duluth, LLC and Davis Television Topeka, LLC (collectively, DTD) in the above-referenced proceeding. This version of the Comments corrects a few typographical errors that inadvertently occurred in the copies of the Comments that were filed yesterday. For the convenience of the Commission, a complete corrected set of the comments is hereby submitted. Also, a corrected copy will be sent by first-class mail today to Dennis P. Corbett, attorney for DTD.

Please direct communications regarding this matter to the undersigned counsel.

Respectfully submitted,

HOGAN & HARTSON L.L.P.

No. of Copies rec'd 0411
L-ABCDE

By: 
Mace J. Rosenstein
F. William LeBeau

Attorneys for
Riverbank Restaurants, Inc.

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

RECEIVED
APR 07 1999
FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)	
)	
Implementation of Section 309(j) of the)	MM Docket No. 97-234
Communications Act -- Competitive Bidding)	
for Commercial Broadcast and Instructional)	
Television Fixed Service Licenses)	
)	
Reexamination of the Policy Statement)	GC Docket No. 92-52
on Comparative Broadcast Hearings)	
)	
Proposals to Reform the Commission's)	GEN Docket No. 90-264
Comparative Hearings Process to Expedite)	
the Resolution of Cases)	
To: The Commission		

**COMMENTS OF RIVERBANK RESTAURANTS, INC. ON
"PARTIAL PETITION FOR RECONSIDERATION"**

Riverbank Restaurants, Inc. ("Riverbank") hereby comments on and endorses the "Partial Petition for Reconsideration" ("Petition") filed by Davis Television Duluth, LLC, and Davis Television Topeka, LLC (collectively, "DTD") in response to the *First Report and Order* in the above-captioned proceeding. 1/

1/ *First Report and Order, In the Matter of Implementation of Section 309(j) of the Communications Act -- Competitive Bidding for Commercial Broadcast and Instructional Television Fixed Service Licenses, Reexamination of the Policy Statement on Comparative Broadcast Hearings, Proposals to Reform the Commission's Comparative Hearings Process to Expedite the Resolution of Cases,*

On August 14, 1996, in the *Sixth Further Notice of Proposed Rule Making* in the digital television proceeding, 2/ the Commission required that any party wishing to file a construction permit application for one of certain vacant NTSC television channel allotments do so by September 20, 1996 (the "DTV Filing Window"). If no applications were filed for a particular allotment before the close of the DTV Filing Window, the allotment would be deleted.

Riverbank, like DTD, applied for a construction permit for a vacant NTSC allotment by the September 20 deadline. Specifically, Riverbank applied for authority to construct a new NTSC television station on Channel 39 at Parkersburg, West Virginia. See FCC File No. BPCT-960920IE. No other parties applied to construct a television station on this allotment by the September 1996 cutoff.

In the *First Report and Order*, the Commission suggested that such a singleton application, even if it was the only application that was timely filed for a particular allotment within the DTV Filing Window, still would be subject to competing applications and, potentially, an auction. Indeed, the Commission indicated that it intended to open another filing window within which parties

MM Docket No. 97-234, GC Docket No. 92-52, GEN Docket No. 90-264, FCC 98-194 (released August 18, 1998) ("*First Report and Order*").

2/ *Sixth Further Notice of Proposed Rule Making*, MM Docket No. 87-268, 11 FCC Rcd 10968 (1996) ("*Sixth Further Notice*").

would be permitted to file applications to compete against such a singleton application.

In the Petition, DTD demonstrated that the Commission's proposed treatment of singleton applications that were timely filed within the DTV Filing Window is unfair and inconsistent with precedent and with the intent of Section 309(j). As DTD illustrated, Congress did not direct the Commission to solicit competing applications for such singleton applications. To the contrary, Congress directed the Commission to "*avoid mutual exclusivity in application and licensing proceedings.*" ^{3/} A fair reading of the legislative history of the Act confirms that the Commission should not force an applicant that timely filed the sole application for a particular allotment within the DTV Filing Window to endure the further uncertainty of additional filing windows or an auction. ^{4/} As the Petition states:

^{3/} Petition at 5 (emphasis in original). Other parties filing petitions for reconsideration also emphasized the Commission's responsibility, under the Act, to adopt regulations that would not result in unnecessary auctions. *See, e.g.,* Homewood Radio Co., L.L.C., Contingent Petition for Reconsideration, *First Report and Order*, at 5 (filed Oct. 13, 1998). The Commission did not accord this statutory mandate sufficient weight in determining the appropriate procedure for awarding construction permits to singleton applicants.

^{4/} *See* Petition at 3-5 (noting that Conference Report suggests that the Commission open a new filing window only in instances in which no filing window ever had existed). That the Commission, in the *First Report and Order*, attempts to sidestep this congressional directive by referring to the DTV Filing Window as a mere "filing opportunity" is not a justification to delay grant of a singleton application like Riverbank's. The DTV Filing Window was clearly sufficient to qualify Riverbank's application for immediate consideration for grant. It was open for more than 30 days, had all the necessary characteristics of

While it is true that no "second chance" window has ever opened during which parties who failed to file during August-September 1996 can now "get in the game," the Conference Report . . . does not speak of the need for *multiple* filing windows, but only of whether the FCC has opened "*a* [singular] filing window" (emphasis added). It is therefore arbitrary to conclude that there has never been a "filing period or window" for [such applications].

Petition at 4. Moreover, precedent suggests that the Commission may not have authority to revise retroactively the rules pursuant to which it processes applications, at least without appropriate compensatory action. 5/

In view of the foregoing, Riverbank respectfully requests that its application for a new NTSC television station on Channel 39 at Parkersburg, West Virginia, not become subject to the delay and uncertainty associated with an additional filing window or auction procedures. Accordingly, Riverbank endorses DTD's Petition and urges the Commission to adopt a more equitable approach -- and one more consistent with the statutory language and intent --


a filing window and effectively resembled the windows routinely used for low-power television applications. *See, e.g.*, 47 C.F.R. §§ 73.3572 & 73.5002(a) (low-power television station filing window is a period identified in a public notice "during which all applicants" must file applications in order to participate).

5/ *See, e.g., Yakima Valley Cablevision, Inc. v. FCC*, 794 F.2d 737 (D.C. Cir. 1986) (noting that "[w]hen parties rely on an admittedly lawful regulation and plan their activities accordingly, retroactive modification or rescission of the regulation can cause great mischief"); *Revision of Application for Construction Permit for Commercial Broadcast Station (Form 301)*, 5 FCC Rcd 7267 (1990) (refusing to apply new filing requirements on construction permit applications retroactively). *Cf. United States v. Winstar Corporation*, 518 U.S. 839 (1996) (noting that government cannot repudiate its contract with private party without due compensation to the party).

than that suggested in the *First Report and Order* with respect to timely filed applications for new NTSC stations against which no timely competing applications have been filed.

Respectfully submitted,

**RIVERBANK RESTAURANTS,
INC.**

By: 
Mace J. Rosenstein
F. William LeBeau

HOGAN & HARTSON L.L.P.
555 Thirteenth Street, NW
Washington, DC 20004-1109
(202) 637-5600

Its Attorneys

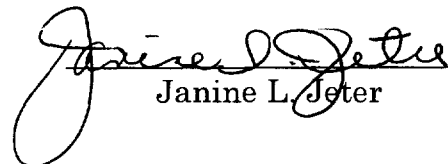
Dated: April 6, 1999

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Comments was mailed,
postage prepaid, this 6th day of April, 1999, to the following person:

Dennis P. Corbett, Esq.
Leventhal, Senter & Lerman P.L.L.C.
2000 K Street, N.W., Suite 600
Washington, D.C. 20006-1809

Counsel to Davis Television Duluth, LLC and
Davis Television Topeka, LLC


Janine L. Jeter